# Washington Water Laws

# A Primer

Washington water law is complex and constantly evolving. In the past ten years, Washington State has enacted and implemented major new laws addressing water conservation, growth management, water resource planning, and water resource data management. State law is likely to evolve further in the near future in light of rapid population growth (much of the cheap, available water is already being used), changes in priorities for water, the difficulty and cost of new water development, and demands to improve the health of streams through such means as the federal Endangered Species Act.

This primer summarizes the major water laws of Washington State and significant case law. It does not discuss the numerous rules and activities that have occurred to implement these laws. A set of commonly used state water laws and rules is available from the Washington State Department of Ecology (Ecology). They may also be acquired through Ecology's homepage: http://www.wa.gov/ecology/leg/laws-etc.html

**Early Water Law**

Long ago acquiring the right to use water was a much simpler process. If water was available, anyone could make reasonable use of it. And because water is essential to life, most settlement and human activity occurred close to water. The *riparian doctrine* of water law allows for the historic reasonable use of water on land adjacent to a water source. The riparian doctrine provided a right to use water in the future dependent upon the water source being adjacent to or within the owner's property. The priority of water rights established under the riparian doctrine was based on the date action was first taken to separate the land from federal ownership. In times of water shortage under the riparian doctrine, all users were to curtail their water uses proportionally.

Even after the colonization of America, and subsequent United States independence, the riparian water laws continued to work quite nicely throughout the eastern portion of this country, where water was plentiful. Settlers who moved west discovered that the old water laws didn't work so well in the drier climates west of the Mississippi River. The early westerners used water in new ways and on land that was distant from the water source. Western water use didn't always fit under the earlier riparian doctrine water laws.

These westerners stopped water flow and stored it, moved it to new locations, and even found new water uses. They discovered that it was necessary to bring the water to where they needed it, rather than bring their needs to the water. This new practice of removing water from the stream and conveying it to remote new places of use became recognized in law as the *appropriation doctrine*. An appropriation doctrine water right is based on actual beneficial use of water, rather than date that land was separated from federal ownership. In the earliest years of Washington statehood, if one intended to secure a water

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right, they posted a notice on a tree or post near the proposed point of diversion, and may have also filed a copy of the notice with the county auditor. If the neighbors did not protect, all that remained was to construct the diversion and put the water to use. However, a water right could also be established by simply constructing a water delivery system and putting the water to beneficial use without notice or recording.

It was through appropriation that the legal concept of water right *priority* emerged, that is in times of shortage, senior right holders have their water needs satisfied first, rather than all users sharing water proportionally. Thus the concept of "first in time, first in right" became a new component of water law in the western United States.

Washington State was one of only a few states with the "dual system" of water law: riparian and appropriation. This fragmented water right process had many problems. There was no provision to require follow-up to determine whether any or all of the water claimed through a notice of an appropriation doctrine diversion actually was put to beneficial use. In some areas, several property owners would claim the entire flow of a stream numerous times. Conflicts between water users resulted in individual lawsuits to settle disputes. Most early court cases dealing with disputes over water rights failed to identify all water users on a problem stream, unless they were named as plaintiff(s) or defendant(s). The courts also failed to sort out the legitimate rights of other water users or to comprehensively settle rights to waters of an entire water source. Clearly, the water right process had become unreliable.

**Washington Water Code of 1917**

In 1913 the Governor formed a commission to study the problem, culminating in the passage of the Washington Water Code of 1917. The Water Code of 1917 provided for centralized water right administration by the state. It required individuals to file application for a permit to establish appropriative surface water rights subject to any existing rights. It directed that public notice be made of all applications with a provision for protest if someone contented an earlier right might be impaired or harmed by a new applicant's water use. Further, the water code required the state to answer four tests in making a decision on new water rights: beneficial use (not wasteful); water is available; no impairment to existing rights; and not detrimental to the public interest. The Water Code also established procedures for adjudicating all existing water rights. A general water right adjudication is a legal process conducted through the State Superior Court that determines the validity and extent of existing water rights in a given area.

The 1917 Water code did not affect existing rights, but made appropriation through a state permit system the exclusive way to establish new rights. The state initially considered that riparian water rights not perfected through actual use were terminated by the passage of the Water Code of 1917. However, a later State Supreme Court case recognized a 15-year period after 1917 for riparian rights to be put to beneficial use. For a riparian water right to be recognized by Ecology or confirmed in an adjudication, steps must have been taken to remove the riparian land from federal ownership prior to June 6, 1917, and water must have been put to beneficial use prior to December 31, 1932.

Much of Washington State's current water law, practices, and uses are based upon this 1917 law. The law written at nearly the turn of the century still is the primary governance of water use in our state, even now as we enter the Year 2000.

## The 1945 Ground Water Code

By 1945, many people in the state were using wells to access ground water. The Legislature then enacted the Ground Water Code, establishing the same permitting process used for surface water. The Ground Water Code provided a three-year opportunity for anyone claiming an existing ground water right to declare that they had already put the ground water to beneficial use. The state then reviewed the declarations that were submitted and issued certificates of ground water right to those who qualified.

The Ground Water Code does allow an exemption to the permit requirement if someone uses a total of 5,000 gallons or less of ground water from a well each day for any of the following combinations:

- Stockwatering purposes;
- Single or group domestic purposes;
- Industrial purposes; **or**
- Watering a lawn or noncommercial garden that is a half-acre or less in size.

As in the case of the 1917 Water Code and surface water, the Ground Water Code is the basis for Washington's current water law, practices and uses of ground water.

## The Minimum Water Flows and Levels Act of 1967

This Act provides a systematic approach to instream flow protection. Under this law, Ecology may, upon request of the Washington Department of Fish and Wildlife or of its own volition, establish minimum flows by administrative rule to protect fish, wildlife, water quality, and other instream values.

## Water Rights Claims Registration

By the 1960's, the legislature realized that records for water rights established before the 1917 surface water code and the 1945 ground water code were incomplete and scattered. As a result, the state had an inadequate understanding of the amount of water being used.

The 1967 Water Right Claims Registration Act directed the then Water Resources Department to record the amount and location of these pre-code water rights by authorizing the state to accept and register water right claims. A water right claim is a statement of claim to water use that began before the state Water Codes were adopted, and is not covered by a water right permit or certificate. A water right claim does not establish a water right, but only provides documentation of one if it legally exists. Ultimately, the validity of claimed water rights would be determined through general water right adjudications.

This law also provides that water must be used under a water right or, after a period of time, the user faces losing their water right through relinquishment back to the state. The law does provide for certain circumstances under which a water right would not be subject to a relinquishment. These sufficient causes include: active military service, drought conditions, court proceedings, or water use for municipal water supply purposes.

The initial statewide opening for filing water right claims ended June 30, 1974. The legislature opened the Water Rights Claims Registry three times since then. The most recent claim registration was from September 1, 1997 until June 30, 1998. When Governor Locke signed the 1997 law re-opening the claims registry, he did so with the hope that it would be the final opening and put an end to the confusion about water rights. To date, Ecology has recorded a total of about 169,000 claims in the claims registry.

### The Water Resources Act of 1971

The legislature passed the Water Resources Act of 1971 to protect and manage the state's water resources for "the greater benefit of the people." This act became necessary because of the increasing conflict in water use and applications for larger amounts of water. Earlier water laws were not equipped to handle these new problems. This act mandates water resources data collection, and development and management of comprehensive basin plans.

This is the present instream flow law used to protect fish and other environmental values by setting minimum instream flow levels basin-wide before issuing new water rights. Instream flows adopted as rules are considered a water right and have as a priority date, the date of adoption of the plan as a rule.

### 1971 Water Well Construction Act

Today, more than 12,000 water wells are drilled each year. This legislation regulates well drilling to protect public health and safety. Water well contractors must pass a test to obtain the required license. Once licensed, Ecology must be notified before a well can be drilled or dug. Well construction can not begin unless a water right permit has been issued (if required for the quantity and use proposed). A driller must submit a water well report to Ecology following construction of a well. By rule, Ecology may limit or prohibit well drilling in areas requiring intensive control of ground water withdrawals.

### 1989 Water Use Efficiency Act

The Water Use Efficiency Act established water conservation as a priority consideration as a source of water. It encourages efficiency improvements, and amended the state plumbing code to require water-conserving fixtures in new construction.

### Growth Management Acts

Growth management legislation, passed in 1990 and 1991, included provisions providing a clearer link between the development of land and water availability. Under these laws, an applicant for a building permit for a structure that will require drinking quality water must provide evidence of an adequate water supply for the intended use of the building.

### Watershed Management Act of 1998

The Watershed Management Act provides a framework to collaboratively solve water issues. This framework is based on geographic areas known as Water Resource Inventory Areas (WRIAs), or watersheds. The act is designed to allow local citizens and local governments to join together with state agencies and tribes to form planning units to develop watershed management plans. These planning units shall assess each WRIA's water supply and use, and recommend strategies for satisfying minimum instream flows and water supply needs. The planning units may develop strategies for improving water quality and protecting or enhancing fish habitat, and in collaboration with Ecology, set instream flows. The legislature also supplied funding for grants to support these local planning efforts.

### Case Law Affecting Water Rights

Several legal and policy issues have also affected water resource management in Washington. Some of these court cases are described below:

- The State Supreme Court ruled in Rettkowski v. Department of Ecology (1993, commonly known as Sinking Creek) that Ecology may not attempt to resolve disputes among conflicting water uses if one or more of them is based on an unadjudicated vested claim to a water right.

- The State Supreme Court in Grimes v. Department of Ecology (1993) set down important case law regarding the obligations of water users to maintain efficient water delivery and use systems that are not wasteful. The opinion also provides important criteria relating to beneficial use.
- The State Supreme Court in PUD No. 1 of Jefferson County v. Department of Ecology (1993, commonly known as the Elkhorn case) ruled that Ecology could use instream flow conditions on a permit that provide a high level of protection for instream values (optimum fish flows based on state of the art studies). This case was subsequently appealed to the United States Supreme Court on other issues and resulted in a landmark opinion regarding the relationship of water quantity and quality.
- The State Court of Appeals ruled in Hubbard v. Department of Ecology (1994) that the connection between ground water and surface water (referred to as hydraulic continuity) may exist even when the point of withdrawal of the ground water is several miles removed from the affected stream. It upheld Ecology's conditioning of a ground water right with instream flows in the Okanogan River, based on continuity between the aquifer and river, even if the effect of pumping on the flow of the river would be small and delayed. The decision also affirmed that where surface and ground water is connected, minimum flows established by rule are treated as appropriations and should be protected from impairment by any subsequent ground water appropriation.
- The State Supreme Court ruled in Hillis v. Department of Ecology (1997) that Ecology must involve the public when making broad policy decisions on setting priorities for water rights permit decisions. That opportunity is provided through Ecology's rule-making process. The court refused to invalidate individual water right decisions Ecology made on the basis of an existing watershed assessment process. The court also found that Ecology may conduct watershed assessments, but may not make the completion of an assessment a requirement or prerequisite to making decisions on applications without first adopting rules.
- In Okanogan Wilderness League v. Town of Twisp and Department of Ecology (1997) the State Supreme Court ruled that Ecology's decision granting a change in the point of diversion for the town of Twisp's surface water right was in error because the water right had been abandoned and was therefore no longer valid. Municipal water rights, while not subject to relinquishment, remain subject to loss through abandonment. The State Supreme Court also held that only the quantity of water that has been put to actual beneficial use is valid for change under an existing water right. In reviewing change and transfer applications, Ecology must first determine the quantity that has been put to historical beneficial use under the existing water right, and then determine that the right was never relinquished or abandoned.
- The State Supreme Court ruled in Department of Ecology v. George Theodoratus (1998) that Ecology is authorized to place new conditions on extensions for water right permits and to issue certificates for water rights only when and to the extent that the water is put to beneficial use.

**Subject areas and corresponding Washington Administration Code (WACs) and Revised Code of Washington (RCWs).**

Administration and regulation of surface and ground water codes

- *Chapter 508.12 WAC*
- *Chapter 90.03 RCW*
- *Chapter 90.44 RCW*

Appropriation Procedures

- *Chapter 508.12 WAC*
- *Chapter 90.03 RCW*

Beneficial Use

- *Chapter 90.14 RCW*
- *Chapter 90.54 RCW*
- *Chapter 90.44 RCW*

Construction of Water Wells and Licensing of Drillers

- *Chapter 173.160 WAC*
- *Chapter 173.162 WAC*
- *Chapter 18.104 RCW*

Fundamentals of Water Resources

- *RCW 90.54.020*

Minimum Water Flows and Levels

- *Chapter 90.22 RCW*
- *Chapter 90.54 RCW*

Unauthorized Use of Water

- *RCW 90.03.010*
- *RCW 90.44.110*

Water Right Relinquishment

- *RCW 90.14.130*

Water Rights Transfer or Change

- *RCW 90.03.380*
- *RCW 90.44.100*
- *RCW 90.44.105*

**For more information**

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